SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 480

J. FIELDS,

vs. *Petitioner,*

R. W. FERGUSON AND GOLDIA FERGUSON,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The opinion of the Supreme Court of Arkansas upon which review is sought appears in the record at pages 58 to 61. The dissenting opinion of Mr. Justice McFaddin, which contains the original opinion of the Court of March 12, 1945, later ordered withdrawn, appears in the record at pages 67 to 73. Both the opinion complained of and the dissenting opinion appear in 188 S. W. 2d at page 302.

II

Jurisdiction

The jurisdiction of this Court is invoked under the due process clause of the 14th Amendment.

> "The federal guaranty of due process extends to State action through its judicial, as well as through its legis-

lative, executive, or administrative, branch of government."

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. at page 680.

The raising of the Federal question on petition for rehearing was timely under the circumstances of this case, and the jurisdiction of this Court is sustained under the doctrine announced in *Saunders* v. *Shaw*, 244 U. S. 317, 320.

III

Statement of the Case

The essential facts of the case are stated in the accompanying petition for certiorari, and are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows:

IV

Specification of Errors

The Supreme Court of Arkansas was clearly in error in granting a rehearing and deciding this case on the issue of a voluntary tax payment amounting to a redemption inuring to respondents' benefit, said issue having been raised for the first time in that Court on rehearing when petitioner was powerless under the law to bring forward any evidence whatever to meet the issue raised at that late date; and the action of said Court in so doing denied petitioner an opportunity to be heard on the issue thus raised and deprived him of his property without due process of law contrary to the provisions of the 14th Amendment as interpreted by this Court.

V

Summary of the Argument

Point A. The action of the Supreme Court of Arkansas herein was contrary to all its previous decisions, and denied petitioner due process.

Point B. The raising of the Federal question herein on petition for rehearing was timely.

VI

ARGUMENT

Point A

The Action of the Supreme Court of Arkansas Herein Was Contrary to All Its Previous Decisions, and Denied Petitioner Due Process.

The issue upon which this case was finally decided was not raised by the pleadings—they raise only one issue: whether or not respondents were served with summons in the foreclosure suit by the bridge district.

After alleging ownership of the lot in controversy, possession thereof, and the payment of the general county and state taxes thereon, respondents' original complaint is as follows:

> "2. That said lot is embraced within the limits of the Sebastian Bridge District and that said Sebastian Bridge District brought a suit in the Sebastian Chancery Court against the Kelly Trust Co. et al., being numbered 10668, against a large number of lots and parcels of land within said district to foreclose the lien held by said district against said property on account of unpaid and delinquent bridge district assessments of benefits against said various lots and parcels of land. That Lot 9, Block 124 Fitzgerald Addition to

the city of Fort Smith belonging to these plaintiffs was included in said suit.

"That a decree of foreclosure was rendered in said suit and said lot was ordered sold, and the same was sold and bid in by said bridge district on September 13, 1939, for the amount of taxes against said property, to-wit: the sum of $24.98.

"3. That had said proceedings been legal and valid as against these plaintiffs, they had under the law a period of two years in which to redeem said property, but before the two year period for redemption had expired, and on December 6, 1940, the said Sebastian Bridge District parted with title to said lot and conveyed the same to the defendant J. Fields, for the said sum of $24.98, plus 20 per cent. That the said J. Fields is now asserting to be the owner of said lot and is attempting to interfere with plaintiffs ownership and possession.

"4. The plaintiffs further state that they were not served with summons in said foreclosure proceeding against Kelly Trust Co., and others, No. 10,668, above mentioned and had no notice that they were parties to said action or that their lot was included therein; and that as far as said proceedings concern them, the same are wholly void and of no effect; and that the deed under which the defendant is now asserting title to said lot is wholly void, and constitutes a cloud upon the title of the plaintiffs, and that plaintiffs are entitled to have their title to said lot quieted and confirmed in them.

"5. Plaintiffs further state that they have tendered to the defendant the amount paid by him to the Sebastian Bridge District, plus 20 per cent and that said tender has been rejected; and plaintiffs hereby tender and pay into court said sum plus 20 per cent." (R. 2-3)

The pertinent parts of the amended complaint making the Sebastian Bridge District a party defendant are as follows:

"2. That said lot is embraced within the limits of the Sebastian Bridge District and that said Bridge District

brought a suit in the Sebastian Chancery Court against the Kelley Trust Co., et al., being numbered 10688, against a very large number of persons, firms and corporations as owners of parcels of land within said district, to foreclose the lien held by the District against said property on account of unpaid and delinquent Bridge District Taxes or assessments of benefits against various pieces of property therein described. That Lot 9, Block 124 Fitzgerald's Addition belonging to the plaintiffs was included in said suit.

"3. That a decree of foreclosure was rendered in said suit on June 17, 1939, in which the property in question, including the lot of the plaintiffs, was ordered sold, and in pursuance of said order and decree said property was offered for sale by the Commissioner appointed to conduct the sale, and the lot of plaintiffs was bid in by the Sebastian Bridge District for the amount of taxes against said lot, amounting to $24.98.

"4. That thereafter and before the expiration of the two year period for redemption allowed by law in such cases, the Sebastian Bridge District conveyed its interest in said lot by quit claim deed to the defendant, J. Fields, for the amount of taxes against said lot, to-wit, $24.98, and the said J. Fields as successor in interest to the Sebastian Bridge District, intervened in said procedure, and then became the real party in interest. That thereafter, and on December 6, 1940, the Commissioner executed his deed to J. Fields to said lot as intervener, and on the same day said deed was duly approved. That said deed attempting to convey said lot to the defendant J. Fields, was also before the expiration of the two year period of redemption in which plaintiffs would have had the right to redeem said lot from the Sebastian Bridge District, had said proceedings been valid and binding against the plaintiff herein.

"5. The plaintiffs state that they were not served with summons in said foreclosure suit of Sebastian Bridge District v. Kelley Trust Co., et al., No. 10,668, and that they had no notice or information that they

had been made parties to said suit or that their lot was included therein; and that as far as said suit concerns them and their title to their said lot, the judgment rendered therein against them is void and of no effect as having been rendered without notice, actual or constructive, to them, and they are entitled to have said judgment against them declared to be void and of no effect.

"6. Plaintiffs state they have requested the defendant J. Fields to reconvey their said lot to them and he refused to do so, and plaintiffs state that they have tendered to the said J. Fields the said sum of $24.98 plus twenty per cent which he has refused to accept, and that the plaintiffs have tendered and paid into court said sum." (R. 5-6)

These pleadings speak for themselves. There is no allegation in respondents' original or amended complaint stating, or intimating even, that Fields was a volunteer in paying the amount necessary to purchase this lot from the district. Neither is there any allegation in either of these pleadings that would put Fields on notice that respondents contended his purchase of the lot amounted to a redemption thereof inuring to their benefit.

On the other hand these pleadings set up the fact that the bridge district sold and quitclaimed its interest in the lot to Fields, and that Fields later intervened in the foreclosure suit and had said sale confirmed and was issued a commissioner's deed conveying said lot to him on December 6, 1940. Fields' deed was not attacked in either of these pleadings because of anything he did or failed to do in effecting the purchase of this lot from the district; said deed was attacked therein solely on the ground that the district had failed to serve respondents with summons in the foreclosure suit and consequently the decree rendered therein was void as to them.

The majority opinion sums up the issues raised by the pleadings as follows:

> "The instant suit was filed February 11, 1942, against Fields by appellants, in which they claimed ownership and possession of the property, that they were not served with summons, had no notice of the foreclosure suit, that the foreclosure proceedings, supra, were void, that the alleged deed from the district to J. Fields was void and of no effect, and prayed that the deed from the district to Fields on September 17, 1940, supra, be canceled and title quieted in them.
>
> "Appellees answer, alleged proper service, that appellants' suit was a collateral attack upon a valid and subsisting judgment, and that the court was without jurisdiction. Upon a trial, the court found the issues in favor of appellee. This appeal followed." (R. 59)

From both the pleadings themselves and the statement of the majority, it is certain that the issue upon which the case was finally decided was not raised in said pleadings: and our Court has held that contentions not within the issues made by the pleadings in the trial court cannot be considered on appeal. *McMillen* v. *East Arkansas Investment Co.*, 196 Ark. 367.

Neither were the pleadings treated as amended in the trial court to conform to the volunteer and redemption theory adopted by the majority on rehearing; nor was said issue raised, urged or suggested in the lower court. The case was tried before the chancellor solely on the question of service, as is clearly indicated by the above quotation from the majority opinion.

The majority say, however:

> "The record further reflects that on July 31, 1940, well within the two-year redemption period, appellee, J. Fields, paid to the Sebastian Bridge District, the taxes due the district for the years 1935-36 and 37, and received receipt therefor, and thereafter on Septem-

ber 17, 1940, the district executed a deed to him for this property.

"Appellants argue that, at the time appellee, Fields, paid the taxes due the bridge district, on July 31, 1940, he was a mere volunteer, had no interest of any kind in the property and acquired none by paying these taxes. They also argue that such payment to the district amounted to a redemption of the property which inured to the benefit of appellants, the owners, and that the deed thereafter from the district to Fields under date of September 17, 1940, was void, since all taxes due the district had been paid.

"It is our view that appellants are correct in all of the above contentions." (R. 59)

"* * * Appellees argue that appellants cannot raise, for the first time here, the above question, which they say was not raised on the trial below. While it does appear that the point that no taxes were due when the deed to Fields was executed was not stressed, it was raised in appellants' brief and was part of the record proof. Appellants' complaint would, and must, be considered as amended to conform to the proof." (R. 60)

The above shows how far astray the majority went in their effort to save respondents' property. They arbitrarily give the payment evidenced by Receipt No. 8500 the effect of a voluntary tax payment. They go on to say:

"This point was not stressed, as it was strongly insisted and relied upon, that no summons of process had been had. The court properly, we think, held against this latter contention, but even so, the contention that no taxes were due when the deed to Fields was executed, must be sustained, and there was, therefore, no authority for the execution of the deed to Fields. Fields had no interest in the property when he paid these taxes to the district, and he acquired no interest by paying them. He was a volunteer, and his payment, which amounted to a redemption inured to the benefit of the owners, appellants, and extinguished the district's lien on the property." (R. 60-61)

Whatever else Receipt No. 8500 may be, it couldn't possibly be a tax receipt, nor could the payment evidenced thereby have extinguished the district's "lien" on the property.

When Receipt No. 8500 was issued on July 31, 1940, time for paying taxes, voluntarily or otherwise, had long since passed, and the district had no lien to be extinguished by payment of taxes. This lien had been reduced to judgment by the foreclosure decree of June 17, 1939, and the lot had been struck off to the district on September 13, 1939, in satisfaction of its lien, when no one appeared at the sale to bid it in. Title to the lot had been in the district some eleven months at the time of this transaction.

There were only two ways the district could dispose of the lot at the time this receipt was issued. One was by sale to a third party such as was done in this case, and the other by redemption by the owner, or by the court for him. See Secs. 29, 32 and 33, Act 104 of the Acts of Arkansas for 1913.

Under these undisputed facts, this payment by Fields could not have been a voluntary tax payment, nor could it have extinguished the district's "lien" against this lot.

Neither could Fields' purchase of this lot have amounted to a redemption for respondents. It is undisputed that he had no interest in said lot prior to the time he purchased it from the district. At the time the district delivered him its deed on September 17, 1940, said district had title to the lot, subject only to redemption by the owner, and it had a perfect right to sell the lot. Even if there had been some doubt about the nature of this transaction, it couldn't be construed to be a redemption for our Court has held that a stranger can't redeem from an improvement district sale. *Webb* v. *Williamson*, 202 Ark. 763.

The sale was duly confirmed on November 5, 1940, and in pursuance of the confirmation decree the commissioner executed his deed on December 6, 1940, conveying said lot

to Fields. Even if the procedure pursued here in effecting the sale be thought to be irregular, it could avail respondents nothing. Our Court has held that confirmation cures all irregularities in the sale. *Cassady* v. *Norris*, 118 Ark. 449.

So also, an order confirming a judicial sale cannot be collaterally attacked except for fraud practiced in its procurement, said order having the force of a final judgment. *Bank of Pine Bluff* v. *Levi*, 90 Ark. 166. Yet the erroneous construction the majority adopted and placed on the payment made by Fields, solely on the strength of the issuance of Receipt No. 8500, certainly and effectively permits a collateral attack on a valid and subsisting judgment; and our Court heretofore has always held this couldn't be done.

In an attempt to get around the fact that the record conclusively shows that the point upon which the case was finally decided was not raised or even suggested in the lower court, the majority say:

> "While it does appear that the point, that no taxes were due when the deed to Fields was executed, was not stressed, it was raised in appellants' brief and was a part of the record proof. Appellants' complaint would, and must, be considered as amended to conform to the proof."

The record, however, shows that no request or suggestion was made by respondents' counsel that the introduction of Receipt No. 8500 raised a new issue and that the pleadings be amended to conform to the proof. (R. 26).

Immediately after the introduction of Receipt No. 8500 the case was closed, and the chancellor delivered the following oral opinion:

> "Oral Opinion from the Bench
>
> "Judge Wofford: 'As I view the law, there is just nothing I can do for you. I wish there were. I tried

a suit a few months ago in which I decided against the daughter of George R. Wood of Van Buren, whom I had known for more than forty years. (Mrs. Anne Wood Locher) She got married and went off to Texas and signed her husband's bond and the Maryland Casualty Co., got a judgment against her for $13,000. She inherited an interest in an estate which was paying her about $1,200 a year for the rest of her life. She needed it. Under the law, it looked like I had to decide against her, and I rendered judgment in favor of the casualty company and they will collect that $1,200 a year until they are paid. I rather hoped the Supreme Court would find that I was mistaken about the law, but they didn't although there was a five to two decision on it. I feel much that way in this case.

'I don't think we can get around the Sheriff's return. It has been a good while, and that looks so much like a circular that might be put in your door, that you might be misled, but, nevertheless, it is a legal summons and there was a publication in the newspaper against all parties with all these names included; and you didn't bring the suit for more than two years—after your period of redemption was passed—so the complaint will have to be dismissed for want of equity.'

"Mr. Ford: 'Save our exceptions, please. And I wish you would fix the time for the bill of exceptions, please sir.'

"The Court: 'Yes sir. If you can reverse me I will shake your hand, and say "Good Boy." There may be something in it I haven't thought of that the Supreme Court may think of. There is seven of them and just one of me.' " (R. 26-27)

The formal decree is in keeping with the above oral opinion, and finds that respondents were duly served in the foreclosure suit by the bridge district and are bound by the decree therein. (R. 30-32)

This opinion shows conclusively that the pleadings were not treated by the chancellor as amended to conform to the

volunteer and redemption theory which wasn't even dreamed of during the trial of the case. Although the chancellor was frankly reluctant to decide the case against respondents, he would not disregard the law to help them—that remained for the majority to do on rehearing.

In *Vincennes Steel Corp.* v. *Derryberry,* 194 Ark. 37, at page 50, it is said:

> "It is the general rule that where evidence is introduced without objection which tends to establish a cause of action not covered in the complaint, the trial court may treat the complaint as amended to conform to the proof, and this court will so treat it, but it must be tried here on the same theory it was tried below. In Banks v. Corning Bank & Trust Co., 188 Ark. 841, 68 S. W. (2d) 452, the Court quoted with approval from 2 R. C. L. 183: 'The authorities are agreed on the proposition that the case on appeal must be decided on the same theory on which it was tried in the court below. Thus, issues which were treated in the lower court by appellant as not involved, cannot be raised on appeal.' So, before we can treat the complaint as amended to conform to the proof, the court below must have so treated it. As said in Roach v. Richardson, 84 Ark. 37, 104 S. W. 538: 'The court below so treated the issue as thus joined on the proof, and after judgment we will treat the answer as amended to correspond with the proof.' Citing cases. Also in Pulaski Gas Light Co. v. McClintock, 97 Ark. 576, 134 S. W. 1189, on page 582, it was said: ' * * * ; and the court below so treated the issue as thus joined on the proof, and the complaint will be treated here as amended to conform to the proof.' Citing Roach v. Richardson, supra. In Barnes v. Hope Basket Co., 186 Ark. 942, 56 S. W. (2d) 1014, it was said: 'The record before us shows that the trial judge granted the request that the complaint be amended to conform to the proof, but clearly indicates that in his opinion in any view of the evidence

no negligence attributable to the defendant was shown, and, without waiting for any amendment to be offered or made, instructed a verdict for the defendant. It is suggested by the appellee that the appellant's failure to amend the complaint precludes him from now complaining * * *. It is always within the sound discretion of the court to permit a complaint to be amended to conform to the proof; and where the allegations in the complaint are insufficient, it is proper at the conclusion of the evidence to treat the complaint as amended to conform to the proof, where there are no objections to the introduction of the evidence and no claim of surprise is made.'

"Now if the court below had treated the complaint as so amended, it could and would be so treated here on appeal. No question was raised in the original brief of appellee that the complaint should be treated as amended, but it is now raised for the first time in the petition and brief on rehearing. It comes too late."

Here the majority, in complete disregard of the law as set out above, arbitrarily held that because of the introduction of Receipt No. 8500 "Appellants' complaint would, and must, be considered as amended to conform" to the theory that no taxes were due the district when the deed to Fields was executed by it. This, despite the fact that the record shows that said complaint was not treated below as amended to conform to any such theory, and that the case was tried before the chancellor solely on the question of service.

Even if Receipt No. 8500 had evidenced a voluntary tax payment, as the majority held on rehearing, still under the above holding the Supreme Court could not have treated the complaint as amended on appeal and have tried the case upon any theory different from that upon which it was tried below.

While we have already pointed out that Receipt No. 8500 couldn't possibly have evidenced a voluntary payment of taxes by a stranger extinguishing the district's lien on the lot in controversy as was held by the majority on rehearing; still, if this point had been suggested in the lower court instead of in the Supreme Court on rehearing, we could and would have shown how and why said receipt came to be issued at all. To do this now we will have to go outside the record as we did in presenting the matter to our Court on rehearing. Under the circumstances of this case, however, we feel that we are justified in doing so as these facts will make the true significance of Receipt No. 8500 and the payment evidenced thereby abundantly clear to this Court.

The issuance of the receipt came about in this manner. Manie Schuman, agent for J. Fields, went to the office of the collector of the bridge district in Fort Smith, and presented Mrs. Patten a list of lots that Fields desired to purchase from the district. After ascertaining the amount of money necessary to effect the purchase of the lots, Schuman tendered it to Mrs. Patten and requested a deed for the lots. Mrs. Patten advised him that the deed could not be executed that day as Mr. Williams, whose signature was necessary, was out of the City. Schuman, not wanting to stay in Fort Smith until Mr. Williams' return, paid Mrs. Patten the amount of money necessary to purchase the lots, and she gave him receipts showing that he had paid for the lots pending delivery of the district's deed conveying said property.

On August 2, 1940, two days after the issuance of Receipt No. 8500, Schuman received the following letter from Mrs. Patten explaining the delay in the delivery of the deed for the property Fields had bought. This letter is on the

Sebastian Bridge District's stationery, and we hold it subject to inspection by this Court. It is as follows:

"Fort Smith, Arkansas,
"August 2nd, 1940.

"Mr. M. Schuman,
Box 814,
Little Rock, Arkansas.

"DEAR SIR:

"This is to advise you that Quit Claim deeds on property described as Lots 19-20-21 Block 7 Fairview Addition, Lot 5 Block 120 Fitzgerald, Lot 9 Block 124 Fitzgerald, Lot 6 Block 63 Fitzgerald, Lot 10 Block 105 Fitzgerald, Lot 6 Block 110 Fitzgerald, Lots 35-36 Block 15 Fairview, Lot 6 Block 7 Park Place and Lot 18 Block 2 Fishback #2, will be de*a*yed until early in September. Said deeds must be signed by Mr. Buck Williams, president of the Sebastian Bridge District. He is out of the city and will not return until the first of September. Will mail deeds to you just as soon as they can be signed after his return.

Yours truly,

SEBASTIAN BRIDGE DISTRICT,
By (Signed) MABEL PAYNE PATTEN,
Collector."

Disregarding the above explanation entirely, however, and considering only the record as made in the lower court, petitioner was clearly taken by "surprise" by the unexpected and unwarranted action of the majority on rehearing.

In *Jones* v. *Seymour*, 95 Ark. 593, it was said at page 597:

"The object of requiring the parties to present all questions and issues to the lower court before they can be presented to this court is to have the lower court pass thereon, so that this court upon appeal may determine whether or not such ruling was erroneous. The purpose is also in furtherance of justice to require the party to first present the question he contends for in the lower

> court, so that the other party may not be taken by surprise. * * * However this may be, the plaintiff is not entitled to raise this question for the first time in this court. Western Coal & Mining Co. v. Jones, 75 Ark. 76; Ward Furniture Mfg. Co. v. Isbell, 81 Ark. 561; Shinn v. Platt, 82 Ark. 260; Kansas City So. Ry. Co. v. Skinner, 88 Ark. 189; Price v. Greer, 89 Ark. 308."

According to the record and to the statement of the majority the issue upon which this case was finally decided was not raised in the trial court, "it was raised in appellants' brief"; and:

> "This Court has frequently held that no issue can be raised in this Court which was not raised in the trial court; and since appellant's present contention was not raised in the trial court, as we have herein pointed out, we believe the relief it is now asking on appeal should be denied. Bolen v. Farmers' Bonded Warehouse, 172 Ark. 975, 291 S. W. 62; Leonard v. Luther, 185 Ark. 572, 48 S. W. (2d) 242; Banks v. Corning Bank & Trust Co., 188 Ark. 841, 68 S. W. (2d) 452; Id. 292 U. S. 653, 54 S. Ct. 863, 78 L. Ed. 1502; Illinois Bankers' Life Assurance Co. v. Lane, 189 Ark. 261, 71 S. W. (2d) 189; Missouri Pacific Railroad Co., et al. v. J. W. Meyers Commission Co., 196 Ark. 976, at page 980. See also State Mutual Insurance Co. v. Latourette, 71 Ark. 242, 74 S. W. 300; Williams v. Bennett, 75 Ark. 312, 88 S. W. 600; Newton v. Russian, 74 Ark. 88, 85 S. W. 407; Reeves v. Wisconsin & Arkansas Lumber Co., 184 Ark. 254, 42 S. W. (2d) 11; Smith v. Milam, 195 Ark. 157, 110 S. W. (2d) 1062; Orr v. Weaver, 203 Ark. 1174, 158 S. W. (2d) 272 and Gulley v. Budd, handed down a week after the opinion in the instant case and appearing in our advance sheet, 83 Law Reporter 591, — S. W. (2d) —."

Not only was the issue upon which the majority decided this case not raised in the trial court, but also neither was it

attempted to be raised in the Supreme Court on the original hearing therein. The majority say "it was raised in appellants' brief", but they don't say in which brief. In an attempt to make it appear that the issue was at least raised in appellants' original brief, the majority say:

> "Appellants, as indicated, though not arguing and stressing the point, clearly raised this issue in their brief in the following language: 'The delinquent taxes were due for the last three years, '35, '36 and '37, and this receipt No. 8500 was issued after 1937, and it was for the '35, '36 and '37 taxes, and 1937 was the last year the taxes were paid in the district. The sale was had in September, 1939. The taxes were paid through the foreclosure procedure and tax receipt No. 8500 would show who paid the taxes and when the taxes were paid. A copy of the tax receipt was introduced showing that the tax was paid July 31, 1940, by J. Fields, of Little Rock, Arkansas, 28.60, R. pp. 35-40' " (R. 83).

In order that this Court may know just when and where this volunteer and redemption theory was first raised we have certified up along with the record copies of respondents' original brief and their brief on rehearing. We have been advised that while these briefs cannot be considered as part of the record, they may be certified up as an appendix to the petition for certiorari so that this Court may have the benefit of the information contained therein.

If the Court will look at page 20 of respondents' original brief by Mr. Ford, the statement quoted by the majority above will be found. It will also be seen, however, that this statement appears in the "Abstract of Testimony", and not in the "Issues" to be submitted to the Court, as the majority indicate. There is no sugegstion even anywhere in said brief that said testimony raised the issue of a voluntary tax payment and redemption.

On the contrary at pages 28 and 29 of said brief, Mr. Ford states the issue as follows:

> "The only issue in this case to be presented to the court is, that there was no service upon appellants by the Sebastian Bridge District in this suit to foreclose its lien for delinquent taxes, and that appellants are not bound by the judgment because they had no knowledge that the Sebastian Bridge District had instituted a suit against them."

As is apparent from the above the volunteer and redemption issue was not submitted to the Supreme Court in respondents' original brief. Nor did it occur to any member of the Court that this testimony raised the volunteer and redemption theory when the first opinion herein was handed down on March 12. In fact in the original opinion, which was unanimous, the court said: "The cause was tried May 23, 1944, upon the issue of whether or not appellants were served with summons in the foreclosure proceedings by the bridge district" (R. 69).

Respondents' original brief, as well as the original opinion, shows conclusively that the volunteer and redemption theory was not raised or argued therein; and our Court has always held that questions not raised in the original brief are deemed to have been waived, and will not be considered when raised for the first time in the reply brief. *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283; *Groves* v. *Keene,* 105 Ark. 40, and *Vincent* v. *Wesson,* 204 Ark. 1108.

If a question can't be raised for the first time on a reply brief in our Supreme Court, then, certainly, it can't be raised for the first time on rehearing, as was done here.

In *Chronister* v. *Skidmore,* 198 Ark. 261, at page 266, it is said:

> "It is the rule in this court that assignments of error not presented or argued on the original hearing will

not be considered on rehearing. Midland Valley Rd. Co. v. Lemoyne, 104 Ark. 327, 148 S. W. 654; Driver v. Gary, 143 Ark. 112, 220 S. W. 667."

See also Bowling v. Stough, 101 Ark. 398.

The question upon which this case was finally decided was first raised in respondents' petition for rehearing, it appearing as the fourth ground therein (R. 66), and it was first argued in their brief on rehearing. (See Appellants' Brief on Rehearing.)

We believe that we have demonstrated to this Court, (1) that the pleadings herein did not raise the volunteer and redemption issue, (2) that said pleadings were not treated as amended to conform to any such theory below, (3) that this case was not tried before the chancellor on the volunteer and redemption theory but was tried solely upon the question of service, (4) that this case was originally submitted to our Supreme Court solely on the question of service, (5) that the volunteer and redemption issue was raised for the first time in our Supreme Court on rehearing, (6) and that the action of our Supreme Court in granting a rehearing and deciding this case on an issue raised there for the first time on rehearing is contrary to all its previous decisions on the question.

Under the circumstances of this case and in view of the long established rules laid down by our Court on such questions, petitioner had no reason to anticipate that the majority would or might depart therefrom, and decide this case on an issue raised for the first time on rehearing when he was powerless to bring forward any evidence whatever to meet the issue thus raised. The action of the majority in deciding this case on an issue raised at that late date clearly denied petitioner an opportunity to be heard thereon, and deprived him of his property without due process of law contrary to the provisions of the 14th Amendment as construed by this Court.

In *Ochoa* v. *Hernandez Y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427, this Court said:

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363, 1369, it is said:

> "The fundamental requisite of due process of law is the opportunity to be heard. (Citing cases.)"

POINT B

The Raising of the Federal Question Herein on Petition for Rehearing Was Timely

As we have already shown, the action of the majority complained of herein was contrary to all our Court's previous decisions, and could not reasonably have been anticipated. Petitioner was taken completely by "surprise" here at a time when he was powerless to do anything about it. He did all he could do under these circumstances, he raised the federal question at his earliest opportunity—on petition for rehearing.

Under the doctrine announced by this Court in *Saunders* v. *Shaw*, 244 U. S. 317, 320, this action was timely, and preserved the jurisdiction of this Court.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the error herein pointed out may be corrected and petitioner's constitutional rights upheld.

The judgment of the Supreme Court of Arkansas herein should be reversed in order that justice may be done petitioner, and to such end the writ of certiorari applied for should be granted and this Court should review the decision of the Supreme Court of Arkansas and finally reverse it, and order the original opinion handed down by that Court herein reinstated and declared to be the law of this case.

Wm. J. Kirby,
Counsel for Petitioner.